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IN THE

Supreme Court Of The United States

DONALD GARRETT,

Petitioner,

v.

OKLAHOMA PANHANDLE STATE UNIVERSITY,

Respondent.

On Petition For Writ of Certiorari to the Supreme Court of Oklahoma

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A Texas court entered a money judgment against an Oklahoma state university. The Oklahoma courts refused to enforce the Texas judgment on the basis that, under Oklahoma law, the state university lacks the capacity to be sued. Texas law, however, dictates that lack of capacity to be sued is an affirmative defense that the Oklahoma state university failed to timely or properly assert, and thus waived. The question presented is: Whether the Full Faith and Credit Clause allows a state to refuse to enforce a judgment entered by a court of a sister state based on an affirmative defense that has been waived under the law of the state of judgment?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Donald Garrett ("Garrett") respectfully prays that a Writ of Certiorari issue to review the decision of the Supreme Court of Oklahoma, entered in the above-titled proceeding on January 16, 2007.

OPINIONS BELOW

The denial of certiorari by the Oklahoma Supreme Court is not reported. It is included in a list of orders reproduced in the Appendix to the Petition ("Pet. App.") at Pet. App. A. The opinion of the Oklahoma Court of Civil Appeals has been designated for publication but has not yet appeared in the Pacific Reporter; it currently may be found at 2006 WL 4046240 and is reproduced at Pet. App. B. The order from the Payne County (Oklahoma) District Court is unpublished

and is reproduced at Pet. App. C. The judgment of the Dallas County (Texas) District Court is unpublished and is reproduced at Pet. App. D.

JURISDICTION OF THIS COURT

The Oklahoma Supreme Court entered the judgment below on January 16, 2007. This Court's certiorari jurisdiction is invoked pursuant to 28 U.S.C. § 1257 and pursuant to Article III, § 2 of the United States Constitution.

STATUTORY PROVISIONS INVOLVED

This case implicates the Full Faith and Credit Clause of Article IV, Section 1 of the United States Constitution which states in relevant part: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

Also implicated is the Oklahoma Uniform Enforcement of Foreign Judgments Act, OKLA. STAT. ANN. 12 § 721, which gives effect to the Full Faith and Credit Clause and states in relevant part:

> A copy of any foreign judgment authenticated in accordance with the applicable Act of Congress or of the statutes of this state may be filed in the office of the court clerk of any county of this state. The clerk shall treat the foreign judgment in the same manner as a judgment of the district court of any county of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a district court of this state and may be enforced or satisfied in like manner.

Texas Civil Practice & Remedies Code § 17.045, Oklahoma Statutes 70 § 3411, and Texas Rule of Civil Procedure 93 are implicated as well. TEX. CIV. PRAC. & REM. CODE § 17.045(b) provides that "[i]f the secretary of state is served with process under Section 17.044(a)(3), he

shall immediately mail a copy of the process to the nonresident (if an individual), to the person in charge of the nonresident's business, or to a corporate officer (if the nonresident is a corporation)." OKLA. STAT. ANN. 70 § 3411 provides that: "(a) The Board of Regents for Oklahoma Agricultural and Mechanical Colleges shall be a body corporate ...." Finally, Texas Rule of Civil Procedure 93 demands that certain affirmative defenses, including the defense of lack of capacity to be sued, be pleaded in verified form:

> A pleading setting up any of the following matters, unless the truth of such matters appear of record, shall be verified by affidavit.
>
> 1. That the plaintiff has not legal capacity to sue or that the defendant has not legal capacity to be sued.
>
> 2. That the plaintiff is not entitled to recover in the capacity in which he sues, or that the defendant is not liable in the capacity in which he is sued.

All state statutes and rules are included in the Petition Appendix.

STATEMENT OF THE CASE

Coaches and other representatives from the Oklahoma Panhandle State University ("OPSU") aggressively recruited Texas resident Donald Garrett ("Garrett") to play intercollegiate basketball for the OPSU "Aggies." OPSU is a university owned and operated by the State of Oklahoma and located in the town of Goodwell, Oklahoma. OPSU is a member of the National Collegiate Athletic Association ("NCAA") and competes in, among other sports, men's basketball. Acting in reliance on OPSU's promises, Garrett accepted OPSU's offer to play basketball for the school and was awarded an athletic scholarship.

During his time at OPSU, Garrett emerged as a star basketball player. Garrett turned in an exceptional performance for the "Aggies" in the 1998-99 NCAA men's basketball season, ranking among the leading scorers in the entire nation. As a member of the NCAA, OPSU is required to keep and report accurate statistics to the NCAA concerning its men's basketball program, including the statistics for individual players. However, all of the basketball team's records and statistics for the 1998-99 season were destroyed or lost by OPSU. As a result of OPSU's failure to properly report, the NCAA lacks any formal records of Garrett's outstanding on-court achievements for OPSU in 1998-99.

After graduating from OPSU, Garrett diligently sought employment as a professional basketball player with various leagues and teams in both the United States and Europe. These potential employers asked to see copies of Garrett's official NCAA statistics, which, due to OPSU's failure to report, Garrett was unable to provide. Lacking verifiable statistical evidence of Garrett's collegiate athletic achievements, no domestic or international basketball team offered Garrett a position.

Garrett concluded that OPSU's failure to keep and report statistics to the NCAA had impeded his career and financially damaged him, and he therefore decided to bring suit against OPSU. Garrett had returned home to Texas to live, so he brought his suit against OPSU in Texas. Garrett filed his complaint (in the Texas court system, his "petition") against OPSU in Texas' 116th Judicial District Court in Dallas County, a trial court of general jurisdiction. Garrett's Petition alleged he suffered damages due to OPSU's negligence, tortuous interference with Garrett's prospective business and contractual relationships, and breach of implied

contract. Garrett's Petition also alleged that OPSU was amenable to suit in Texas.[1]

Garrett followed Texas law to the letter in serving process on OPSU, a nonresident defendant lacking an agent in Texas.[2] Garrett issued a summons (in Texas terminology, a "citation") that was served on the Secretary of State for the State of Texas in his statutory capacity as the agent for all nonresident defendants lacking a designated agent for service of process. In precise compliance with Texas law, the Texas Secretary of State promptly forwarded the citation and a copy of Garrett's petition to OPSU's Interim President via certified mail, return receipt requested, at the President's Office on the OPSU campus. The executed return receipt was received back by the Texas Secretary of State's office, thereby confirming OPSU's receipt of the citation and completing service of process under Texas law. OPSU has never denied that it had actual notice of Garrett's lawsuit.

OPSU ignored Garrett's suit. Having been served with process under Texas law, OPSU had numerous procedural options available to it—including, but not limited to, filing an answer, challenging the Texas court's jurisdiction, or seeking a *forum non conveniens* dismissal—but OPSU did not avail itself of any of them. Instead, neither OPSU nor anyone acting on its behalf ever answered—or even acknowledged—Garrett's Texas suit. OPSU made the conscious decision not to litigate this case in any capacity.

In response to OPSU's silence, Garrett filed a motion for default judgment. On March 11, 2003, the Texas trial court conducted an evidentiary hearing on Garrett's motion for

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[1] Evidence of OPSU's minimum contacts with the State of Texas is uncontroverted. OPSU directed numerous contacts to Texas, including personal visits by OPSU representatives, in order to scout, recruit, and sign Garrett. Moreover, the OPSU men's basketball team regularly plays games in Texas. No court below ruled that OPSU lacked sufficient minimum contacts with Texas.

[2] TEX. CIV. PRAC. & REM. CODE § 17.044.

default judgment, but OPSU again did not appear. In evaluating the proposed default judgment, the Texas trial court determined that service of process was properly effectuated under Texas law and that it had personal jurisdiction over OPSU, considered Garrett's claims against OPSU, and entertained evidence regarding damages. Based on the evidence presented to it at this hearing, the Texas trial court entered a Default Judgment against OPSU for actual damages in the amount of $2,500,000.00, exemplary damages in the amount of $500,000.00, prejudgment interest in the amount of $42,410.96, and post-judgment interest in the highest legal rate from judgment until paid. *Garrett V. OPSU*, No. 02-11694-F (Dallas County Dist. Ct. March 11, 2003), at Pet. App. D, p. 14a.

Pursuant to the Full Faith and Credit Clause of the United States Constitution, Garrett promptly sought to enforce his judgment against OPSU in Oklahoma. Garrett filed an Affidavit for Filing Foreign Judgment and Notice of Filing Foreign Judgment in the District Court of Oklahoma County, State of Oklahoma. In response, OPSU, through its governing body, the Board of Regents for Oklahoma State University and the Oklahoma Agricultural and Mechanical Colleges (the "Board of Regents"), filed a Motion to Vacate the Texas Judgment and a Motion to Transfer. OPSU's Board of Regents argued that, under Oklahoma law, OPSU lacked the statutory capacity to be sued and that, instead, the Board of Regents—rather than OPSU itself—was the proper defendant under Oklahoma law. The Oklahoma County Court granted the Board of Regents' Motion to Transfer the case to Payne County, Oklahoma—the county in which OPSU is located. The Payne County court, in turn, conducted a non-evidentiary hearing on the Board of Regents' Motion to Vacate and subsequently vacated the Texas judgment against OPSU. *Garrett v. OPSU*, No. C-2004-309 (Payne County Dist. Ct. May 25, 2005) at Pet. App. C, p. 12a.

Garrett appealed the Oklahoma trial court's vacatur of his Texas judgment to the Oklahoma Court of Civil Appeals. Reasoning that "Panhandle State University cannot be a proper party defendant under Oklahoma law," the Oklahoma Court of Civil Appeals affirmed the vacatur of the Texas judgment. *Garrett v. OPSU*, No. 102253 (Okla. Civ. App. July 20, 2006) at Pet. App. B, p. 11a.

Garrett next sought review from the Oklahoma Supreme Court. However, on January 16, 2007, the Oklahoma Supreme Court denied Garrett's Petition for Certiorari without comment. Jan. 16, 2007 Orders, Oklahoma Supreme Court, at Pet. App. A, p. 1a.

STATEMENT OF FEDERAL QUESTION RAISED

Filing the Texas Judgment in a sister state's court for enforcement inherently invoked the Full Faith & Credit Clause of the United States Constitution. The Full Faith and Credit Clause was formally raised in Garrett's Response to OPSU's Motion to Vacate and has been raised in Garrett's briefing to the Oklahoma trial court, the Oklahoma Court of Appeals and the Oklahoma Supreme Court. Each Oklahoma court has ruled that OPSU made a valid collateral attack on the Texas judgment, thereby permitting the courts of Oklahoma to avoid enforcing the Texas judgment while purportedly complying their full faith and credit obligations.

REASONS FOR GRANTING THE WRIT

This case presents one of the "few and far between" instances in which "the judgment of one State has been denied full faith and credit in another State, because its enforcement would contravene the latter's policy." *Estin v. Estin*, 334 U.S. 541, 545 (1948). Faced with a direct conflict between Oklahoma's policy that OPSU lacks the capacity to be sued and Texas' law that a party's purported lack of capacity must be asserted as an affirmative defense in a pleading verified by affidavit, the Oklahoma courts elected to ignore Texas law and refused to treat OPSU's lack of

capacity defense as waived. Instead, the Oklahoma courts vacated the Texas judgment because OPSU, as distinct from its Board of Regents, "cannot be a proper party defendant ***under Oklahoma law***." *Garrett v. OPSU*, at Pet. App. B, p. 11a (emphasis added). The Oklahoma Supreme Court's decision to permit this non-jurisdictional collateral attack on a sister state's judgment manifestly violates the Full Faith and Credit Clause. To let stand the Oklahoma courts' policy-driven vacatur of a Texas judgment would be to permit the Full Faith and Credit Clause "to be applied, accordion-like, to accommodate [the] . . . predilections" of the states. *Estin*, 334 U.S. at 546.

I. THE OKLAHOMA COURTS IGNORED THE "EXACTING" REQUIREMENTS OF FULL FAITH AND CREDIT

A. The Courts of Oklahoma Must Enforce Texas Judgments and Cannot Entertain Non-Jurisdictional Attacks Against Them

Under the Full Faith and Credit Clause, it is indisputably the duty of the Oklahoma courts to give force and effect to any judgment validly issued by the courts of Texas. As this Court has repeatedly declared, "[a] final judgment of one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998). Indeed, the obligations imposed upon the states by the Full Faith and Credit Clause are at their most "exacting" in the context of enforcing the judgments of the courts of a sister state. *Id.* So strong is the full faith and credit obligation that "[i]n numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded." *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935). Moreover, the Full Faith and Credit Clause compels "submission by one State ***even to hostile***

policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demand[s] it." *Estin*, 334 U.S. at 546 (emphasis added).

It is precisely such a "submission . . . to hostile policies reflected in the judgment of another State," *id.*, that the courts of Oklahoma have refused to make here. Under the Full Faith and Credit Clause, there are only two legitimate reasons for a state court to decline to enforce a judgment entered by a court of a sister state—a lack of either (1) subject matter jurisdiction, or (2) personal jurisdiction on the part of the court that entered judgment. *See, e.g*, *Baker*, 522 U.S. at 233; *Nevada v. Hall*, 440 U.S. 410, 421 (1979) ("A judgment entered in one State must be respected in another provided the first State had jurisdiction over the parties and the subject matter."). In other words, beyond permitting a basic examination of jurisdiction, the Full Faith and Credit Clause protects the judgments of one state against collateral attack in the courts of a second state. *Id.* Oklahoma law recognizes as much. OKLA. STAT. ANN. 12 §§ 720-21; *Aetna Fin. Co. v. Bowler*, 622 P.2d 292 (Okla. Ct. App. 1980) ("It is basic law that a final judgment of a court of a sister state with personal jurisdiction over the parties is entitled to full faith and credit . . . . Nor can Oklahoma courts reexamine the merits of a sister state court's decision no matter how clearly that court may have erred."). Nonetheless, in the instant case, a judgment entered by a Texas court has been vacated in Oklahoma based upon a non-jurisdictional collateral attack.[3]

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[3] Notably absent from this case is any contention that OPSU, as a subdivision of the State of Oklahoma, is immune to suit in the courts of Texas. This Court's precedents have made abundantly clear that state agencies are amenable to suit in the courts of sister states. *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 497-98 (2003); *Hall*, 440 U.S. at 414-21. While comity will sometimes weigh against such suits, there is no general prohibition against suing an agency of one state in the courts of a second. *Hyatt*, 538 U.S. at 499; *Hall*, 440 U.S. at 426.

B. Under Texas Law "Lack of Capacity" and "Defects of Parties" Are Affirmative Defenses That Are Waived Unless Pleaded in Verified Form

Although superficially couched in terms of personal jurisdiction, the Oklahoma courts based their vacatur of Garrett's Texas judgment on OPSU's ***lack of capacity*** to be sued under Oklahoma law. Indeed, the Oklahoma Court of Appeals was unambiguous in stating the basis for its decision to vacate the Texas judgment: "Panhandle State University cannot be a proper party defendant ***under Oklahoma law***." *Garrett v. OPSU*, at Pet. App. B, p. 11a. (emphasis added). The Oklahoma Court of Appealed reasoned that OPSU "is not a legal entity" under Oklahoma law and that, as such, Garrett's suit should instead have been directed against and served upon OPSU's governing body, its Board of Regents, which is a "body corporate" and, unlike OPSU itself, has the legal capacity to be sued pursuant to Oklahoma statute. *Garrett v. OPSU*, at Pet. App. B, p. 8a (relying on OKLA. STAT. ANN. 70 § 3411(a)).[4] Based on the fact that Garrett sued and served OPSU itself, rather than its Board of Regents, the Oklahoma Court of Appeals concluded that "Texas did not obtain personal jurisdiction over the Board of Regents" and therefore vacated Garrett's Texas judgment against OPSU. *Garrett v. OPSU*, at Pet. App. B, p. 8a. The Oklahoma Supreme Court, in turn, left this result undisturbed.

Moreover, given OPSU's failure to answer Garrett's suit, the Texas trial court can hardly be faulted for declining to exercise its discretion to extend comity to OPSU. In the final measure, if the University of Nevada can be successfully sued in the courts of California, then the same fate can obviously befall OPSU in Texas. *Hall*, 440 U.S. at 414-21.

[4] The Board of Regents has "supervision, management and control" of several Oklahoma universities, including OPSU and the flagship Oklahoma State University ("OSU"). OKLA. STAT. ANN. 70 § 3412.

By vacating the Texas judgment because of OPSU's lack of capacity to be sued, the Oklahoma courts ignored Texas law and displaced it with Oklahoma law. In Texas, the capacity to be sued and personal jurisdiction are entirely distinct concepts.[5] Texas law demands that any assertion that "the defendant has not legal capacity to be sued" be made to the trial court in the form of a pleading verified by affidavit. *See* TEX. R. CIV. P. 93(1); *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996). In other words, Texas classifies "lack of capacity" as a special affirmative defense that must be pleaded in verified form at the outset of litigation. *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991) ("A party relying on an affirmative defense must specifically plead the defense and, when the defense is based on a claim enumerated in Rule 93, must verify the pleading by affidavit."). Any argument regarding lack of capacity is waived by the failure to timely and properly raise it in the trial court. *Sixth RMA Partners v. Sibley*, 111 S.W.3d 46, 56 (Tex. 2003); *Nootsie*, 925 S.W.2d at 662 ("We have not hesitated in previous cases to hold that parties who do not follow Rule 93's mandate waive any right to complain about the matter on appeal.").

Under Texas law, "[w]hen capacity is contested, Rule 93 requires that a verified plea be filed anytime the record does not affirmatively demonstrate the plaintiff's or defendant's right to bring suit or be sued in whatever capacity he is suing. . . . ***The rule means just what it says***." *Pledger v.*

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[5] Texas law defines lack of "legal capacity to be sued" as an affirmative defense that must be asserted as a verified pleading. TEX. R. CIV. P. 93(1). In contrast, a challenge to the personal jurisdiction of a Texas Court must be asserted in a "special appearance" filed prior to any other responsive pleading. *See* TEX. R. CIV. P. 120(a)(1). A "special appearance" challenging personal jurisdiction does not go to the legal capacity of the entity to be sued, but rather to the existence of minimum contacts between the nonresident defendant and the State of Texas. *See Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005).

Schoellkopf, 762 S.W.2d 145, 146 (Tex. 1988) (emphasis added). Texas law does not permit the post-judgment assertion of lack of capacity to be raised, and a collateral attack on a judgment based on such an assertion in a Texas court would fail. Nonetheless, the courts of Oklahoma vacated Garrett's Texas judgment based on exactly such a collateral attack from OPSU. Simply stated, OPSU waived its affirmative defense of "lack of capacity" by failing to assert it in verified form in the Texas trial court, and the Oklahoma courts were not free to resurrect this defense in contravention of Texas law.

Texas law similarly requires that any alleged "defect of parties"—such as the misidentification of a corporate defendant—be pleaded as an affirmative defense and verified by affidavit. *See* TEX. R. CIV. P. 93(4); *Van Voorhies v. Hudson*, 683 S.W.2d 809, 810 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). Just as with lack of capacity, the affirmative defense of "defect of parties" is waived under Texas law by a party's failure to timely plead it in verified form to the trial court. *Nootsie*, 925 S.W.2d at 662; *Pledger*, 762 S.W.2d at 146; *Van Voorhies*, 683 S.W.2d at 810. The Texas concept of "defect of parties" encompasses errors such as naming the wrong corporation as a defendant when suing affiliated entities and suing the operating company rather than the actual owner of a property. *See, e.g., E-Tex Dairy Queen, Inc. v. Adair*, 566 S.W.2d 37, 38-39 (Tex. Civ. App.—Beaumont 1978, no writ) (defendant waived argument that plaintiff improperly sued "E-Texas Dairy Queen, Inc." rather than the correct corporate defendant, "E-Texas Dairy Queen Co.", because defendant failed to file a verified pleading raising this defect); *Cantu v. Holiday Inns, Inc.* 910 S.W.2d 113, 115 (Tex. App.—Corpus Christi 1995, writ denied) (verified denial was required in order for defendant to assert that it was merely a licensor rather than the owner of the hotel and thus not the proper defendant); *Quarles v. Champion Int'l Corp.*, 760 S.W.2d 792, 794 (Tex. App.—Beaumont 1988, no writ) (defendant waived

argument that he was improperly sued in a fiduciary rather than individual capacity by failing to raise it via a verified pleading). In other words, Texas Rule of Civil Procedure 93(4) puts substance ahead of form, and is intended to prevent defendants from escaping liability based on immaterial defects in identification.

As with lack of capacity, a defect concerning the identification or naming of party is waiveable and is not a basis for collaterally attacking a judgment under Texas law. Again, however, the Oklahoma Courts rejected Texas law and permitted a collateral attack against Garrett's judgment based on the "defect in the parties" of naming OPSU itself, rather than its Board of Regents, as the defendant.

In sum, Texas Rule of Civil Procedure 93 and the cases applying it articulate an important and substantive principle of Texas law: Texas has determined that certain affirmative defenses—including both the lack of capacity to be sued and any defects in the identification of the defendant—are so critical that they must be pleaded in verified form at the outset of litigation or they are waived. Texas has made a legitimate and permissible policy choice: by requiring defendants that deny that they have the capacity to be sued (or who claim that they have been misidentified) to assert these defenses at the outset of litigation via a sworn affidavit, Texas affords plaintiffs the opportunity to appropriately amend their complaints and to identify the proper defendant. This Texas policy is designed to preclude defendants from engaging in litigation-by-trick and prevents defendants from escaping liability through a complex corporate structure or based on minor errors in identification. This is plainly "a subject matter concerning which [Texas] is competent to legislate" and, as such, not to be set aside if favor of the laws of a sister state. *Pac. Employers Ins. Co. v. Indust. Accident Comm'n*, 306 U.S. 493, 501 (1939). In blunt terms, Texas has opted for a policy designed to prevent defendants from "hiding behind a log," and that policy finds form in Texas Rule of Civil Procedure 93 and the cases applying it. The

Full Faith and Credit clause requires Oklahoma to respect and apply this substantive Texas policy when enforcing a Texas judgment.

C. In Order to Vacate Garrett's Judgment Against OPSU, the Oklahoma Courts Improperly Ignored Controlling Texas Law

The Oklahoma courts' vacatur of Garrett's Texas judgment is fundamentally at odds with the Texas Rule of Civil Procedure 93 and the policy that it embodies. It is undisputed that OPSU did ***not*** file a verified pleading in the Texas trial court asserting its purported lack of capacity to be sued or alleging that it (as distinct from its Board of Regents) was an improper defendant. As such, under Texas law OPSU waived both of these affirmative defenses, and it may no longer complain about either its lack of capacity to be sued or the notion that its Board of Regents, rather than OPSU itself, should have been named as the defendant. *Nootsie*, 925 S.W.2d at 662; *Pledger*, 762 S.W.2d at 146.

Nonetheless, OPSU's purported lack of capacity to be sued and the naming of OPSU, rather than its Board of Regents, as the defendant are precisely the reasons that the Oklahoma courts articulated for vacating Garrett's Texas judgment. *Garrett v. OPSU*, at Pet. App. B, p. 8a., 11a. Indeed, these are the ***only*** reasons identified by the Oklahoma courts for vacating the Texas judgment:

> Panhandle State University cannot be a proper party defendant under Oklahoma law. The Board of Regents, or one of its named legal agents, had to have been served with process.

Garrett v. OPSU, at Pet. App. B, p. 11a. As such, the Oklahoma courts allowed OPSU to collaterally attack the Texas judgment based on two affirmative defenses—lack of capacity to be sued and defect of parties—that OPSU had indisputably waived under Texas law. By permitting OPSU to resurrect these waived defenses, the Oklahoma courts

have fatally undermined the key protection that Texas Rule of Civil Procedure 93 affords to plaintiffs: if OPSU had filed a verified pleading in the Texas trial court asserting its lack of capacity to be sued, Garrett could have amended his Petition to name the allegedly proper defendant—the Board of Regents. The Oklahoma Courts have made an improper end-run around Texas law and have permitted the defendant to successfully "hide behind a log" in exactly the manner that Texas law forbids.

The Full Faith and Credit Clause does not permit this result. If the Texas policy embodied in Texas Rule of Civil Procedure 93 is in conflict with Oklahoma law concerning OPSU's legal capacity, Texas law must prevail. *Milwaukee County*, 296 U.S. at 277 (holding "that considerations of policy of the forum which would defeat a suit upon the original cause of action are not involved in a suit upon the judgment and are insufficient to defeat it."). Indeed, this Court's precedents demand that Oklahoma enforce Garrett's Texas judgment despite the fact that doing so may require submission "even to the hostile policies reflected in the judgment of another State." *Estin*, 334 U.S. at 546. It is for this reason this Court has mandated, for example, that "[f]ull faith and credit is required to be given to the judgment of another state, although the original suit on which it was based arose in the state of the forum and was barred there by the Statute of Limitations when the judgment was rendered." *Milwaukee County*, 296 U.S. at 277 (citing *Roche v. McDonald*, 275 U.S. 449 (1928)). For example, full faith and credit applies even "where the original suit was upon a gambling contract invalid by the law of the forum where it was made." *Id.* (citing *Fauntleroy v. Lum*, 210 U.S. 230 (1908)). Moreover, this Court is not "aware of considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to [a money] judgment outside the state of its rendition." *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438, (1943).

In sum, this Court has "recognized the second State's obligation to give effect to another State's judgments even when the law underlying those judgments contravenes the public policy of the second State." *Baker*, 522 U.S. at 243 (Kennedy, J., concurring).

Against the backdrop of these precedents, to permit Oklahoma law regarding OPSU's lack of capacity to *ex post facto* displace the Texas law embodied in Texas Rule of Civil Procedure 93 "would be obnoxious" to legitimate Texas policies and would improperly allow Oklahoma "to project its laws across state lines so as to preclude [Texas] from prescribing for itself the legal consequences of acts within it." *Hall*, 440 U.S. at 423-24.

Oklahoma's own precedents properly demand enforcement of Garrett's Texas judgment based on Texas law: "The basic question as to what effect a Texas judgment has in Oklahoma is answered by reference to Texas, not Oklahoma, law." *Bowler*, 622 P.2d at 293; *see also Pettit v. Am. Nat'l Bank of Austin*, 649 P.2d 525, 527 (Okla. 1982) ("The regularity and validity of a foreign judgment, including issues concerning the foreign court's jurisdiction, should be tested by the law of the jurisdiction where the judgment was rendered."). Proceeding under Texas law, the result here could not be more clear; OPSU waived both its purported lack of capacity to be sued and its alleged misidentification a defendant vis-à-vis its Board of Regents. This should end the matter.

II. OKLAHOMA'S REFUSAL TO ENFORCE GARRET'S JUDGMENT WAS NOT BASED ON A LACK OF PERSONAL JURISDICTION OR IMPROPER SERVICE OF PROCESS

The Oklahoma courts improperly attempt to recast OPSU's lack of capacity to be sued and purported misidentification as a defendant into an issue of personal jurisdiction:

> The record reveals that Garrett served Panhandle State attempting service of process according to Texas law, by serving its Secretary of State who then mailed a copy of the process to the non-resident (interim president), by certified mail, return receipt requested. The Board of Regents for Oklahoma Agricultural and Mechanical College is a "body corporate [OKLA. STAT. ANN. 70 § 3411(a)] which has appointed agents for service of process. There is no proper agent for Panhandle State, which is not a legal entity. Consequently . . . Texas did not obtain personal jurisdiction over the correct party.

Garrett v. OPSU, at Pet. App. B, p. 8a (footnotes omitted). This "jurisdictional" analysis does not withstand scrutiny under the Full Faith and Credit Clause.

First, OPSU was properly served with process under Texas law. There is no dispute that Garrett correctly provided service of process on OPSU as a nonresident doing business in Texas. *See* TEX. CIV. PRAC. & REM. CODE §§ 17.044-.045. It is uncontested that Garrett properly served the Texas Secretary of State and that the Texas Secretary of State then completed service by "immediately mail[ing] a copy of the process to the nonresident (if an individual), to the person in charge of the nonresident's business, or to a corporate officer (if the nonresident is a corporation)." TEX. CIV. PRAC. & REM. CODE §17.045. Under Texas law, this completed service of process upon OPSU. *Capitol Brick, Inc. v. Fleming Mfg. Co.*, 722 S.W.2d 399, 401 (Tex. 1986). OPSU's Interim President was served by the Texas Secretary of State, and the return receipt was received back by the Secretary of State. Moreover, OPSU has never contested that it received actual notice of Garrett's suit. Based on the foregoing, the Texas court's judgment concluded that service upon OPSU was proper under Texas law and that the court had personal jurisdiction over OPSU. Indeed, the Oklahoma Court of Civil Appeals acknowledged that "there was a

recitation on the [Texas] judgment roll that service was proper." *Garrett v. OPSU*, at Pet. App. B, p. 10a.

Carefully reviewed, the Oklahoma courts did not hold that OPSU ***was not*** served with process, but rather that, due to its statutory lack of capacity to be sued, it ***could not*** be served with process. Texas law simply does not accept this distinction or permit this result; OPSU's Interim President received the Citation and Garrett's Petition from the Texas Secretary of State, and it was thereafter incumbent upon OPSU to assert any "lack of capacity" or "defect of parties" defenses in verified form in the Texas court. Stated another way, the Oklahoma court's conclusion that the Texas court failed to "obtain personal jurisdiction over the correct party" was based exclusively on OPSU's purported lack of capacity to be sued or, thus, to receive process. Indeed, "the Board of Regents did not offer any extrinsic evidence of failure to obtain personal jurisdiction" and OPSU never presented any evidence rebutting Garrett's allegations that OPSU was amendable to personal jurisdiction in Texas. *Garrett v. OPSU*, at Pet. App. B, p. 8a. This complete lack of any evidence indicating an absence of personal jurisdiction in Texas confirms that the Oklahoma court improperly conflated and confused OPSU's lack of capacity to be sued under Oklahoma law with a lack of personal jurisdiction in Texas. These are distinct concepts, and the former does not imply—much less compel—the latter; under Texas law OPSU's assertion that it lacks the capacity to be sued remains nothing more than an affirmative defense that it waived, not a viable challenge to the *in personam* jurisdiction of the Texas court that entered judgment.

Finally, under the Texas law of "absolute verity" the trial court's recitation in its judgment that service and personal jurisdiction were proper is final and precludes any collateral attack alleging the contrary. *A.L.T. Corp. v. Small Bus. Admin.*, 801 F.2d 1451, 1457 (C.A. 5, 1986) (applying Texas law and relying on *Pure Oil Co. v. Reece*, 78 S.W.2d 932, 934 (Tex. 1935) ("[I]t is the settled rule of this state that

where a judgment is collaterally attacked, plain jurisdiction recitals contained therein must be accorded absolute verity.")). Under Texas law, because the Garrett's Texas judgment recites that service and personal jurisdiction were both proper, the "judgment was thus subject to the Texas absolute verity rule, and is not open to collateral attack." *Id.* at 1457.[6] However, just as they did with Texas Rule of Civil Procedure 93, the Oklahoma courts elected not to apply the Texas "absolute verity" rule and instead permitted the very sort of collateral attack that the doctrine precludes. By refusing to afford Garrett's judgment the "absolute verity" to which it was entitled under Texas law, the Oklahoma courts once again violated their full faith and credit obligations.

CONCLUSION

As noted, this Court has observed that "situations where a judgment of one state has been denied full faith and credit in another State, because its enforcement would contravene the latter's policies, have been few and far between." *Estin*, 334 U.S. at 545-46. However, this is precisely such a case. It is therefore worthy of this Court's attention. Oklahoma has refused to afford full faith and credit to a Texas judgment solely because of an Oklahoma policy that Texas law plainly precludes from applying here. To permit Oklahoma to displace Texas law with its own would gravely weaken the "exacting, if not inexorable", *id.*, requirements that the Full

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[6] The Fifth Circuit has succinctly explained the Texas "absolute verity" doctrine:

> A judgment asserting the due service of process may not be attacked in a collateral proceeding, notwithstanding evidence from the remainder of the record which indicates to the contrary. . . . The purpose of this longstanding Texas doctrine is to achieve the finality of judgments. . . . Although it is occasionally harsh in result, Texas courts have created and upheld the absolute verity rule as a policy to protect their judgments from indefinite suspicion and unwarranted attack.

A.L.T. Corp., 801 F.2d at 1457.

Faith and Credit Clause imposes on the states. Garrett therefore prays that the Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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April 16, 2007

APPENDIX

APPENDIX A

THE SUPREME COURT OF THE
STATE OF OKLAHOMA

[Filed Jan. 16, 2007]

THE CLERK IS DIRECTED TO ENTER THE
FOLLOWING ORDERS OF THE COURT:

101,239 *Paula J. Moore Moorad v. Monty Foster* and Courtney Foster, Foster Properties, LLC, f/k/a Monty Foster d/b/a Foster Properties, at al. Petition for certiorari is denied.
ALL JUSTICES CONCUR

102,050 *Raymond McCormick and Donita McCormick, husband and wife v. Royce Hinkle, Jr., M.D., and Freda T. Hinkle, husband and wife.* Petition for certiorari is denied.
ALL JUSTICES CONCUR

102,253 *Donald Garrett v. Oklahoma Panhandle State University Petition* for certiorari is denied.
ALL JUSTICES CONCUR

102,363 *Olen Cranfield v. Oleg & Ina Guriev*, husband and wife, deceased, at al. Petition for certiorari is denied.
ALL JUSTICES CONCUR

103,053 *Commercial Financial Services, Inc. v. J. P. Morgan Securities, Inc.*, f/k/a Chase Securities, Inc. Petition for certiorari is denied. CONCUR: Winchester, C.J., Edmondson, V.C.J., Lavender, Kauger, Watt, Taylor, Colbert, JJ.
CONCUR IN PART; DISSENT IN PART: Hargrave, J. DISSENT: Opala, J.

103,487 Ivy *Lively Newton Cox v. Kaiser-Francis Oil Company, et al.*
Petition for certiorari is denied.
CONCUR: Winchester, C.J., Edmondson, V.C.J., Lavender, Hargrave, Kauger, Watt, Taylor, Colbert, JJ. DISSENT: Opala, J.

103,748 Cortez Nathaniel Meadows v. State of Oklahoma, ex rel., Department of Public Safety
Rehearing is denied.
ALL JUSTICES CONCUR

103,964 *Patricia K. Doornbos v. Honorable Janice P. Dreiling, Judge of the District Court of Washington County, Oklahoma* Motion for sanctions is denied.
CONCUR: Winchester, C.J., Edmondson, V.C.J., Lavender, Opala, Kauger, Watt, Taylor, Colbert, JJ. DISQUALIFIED: Hargrave, J.

/s/_____
CHIEF JUSTICE

APPENDIX B

COURT OF CIVIL APPEALS OF OKLAHOMA
Division No. 3

No. 102253

DONALD GARRETT,
Plaintiff/Appellant,

v.

OKLAHOMA PANHANDLE STATE UNIVERSITY,
Defendant/Appellant.

July 20, 2006
Certiorari Denied Jan. 16, 2007

KENNETH L. BUETTNER, Chief Judge.

On December 13, 2002, Donald Garrett filed a petition in Dallas County, Texas, alleging Oklahoma Panhandle State University negligently failed to maintain his basketball statistics for the academic year (basketball season) 1998-1999, by losing or destroying them; tortiously interfered with his business and contractual relationships with potential employers by failing to report to the NCAA his performance statistics; and breached an implied contract whereby in exchange for his participation in Panhandle State's men's basketball program, Panhandle State would maintain his statistics and report them to the NCAA. He claimed actual and punitive damages because of Panhandle State's breaches of duty and contract. He served the Secretary of State of Texas who forwarded by certified mail January 2, 2003, a copy of the petition to Panhandle State's interim president with return receipt requested. The receipt was signed by the interim president's agent and received in the Secretary of State's office

January 7, 2003. Panhandle State did not answer the lawsuit, and a default judgment was taken against it in the District Court of Dallas County, Texas for $2,500,000 in actual damages and $500,000 in punitive damages, plus pre- and postjudgment interest. Garrett thereafter filed his judgment in Oklahoma County pursuant to the Uniform Enforcement of Foreign Judgments Act, 12 O.S.2001 § 719 *et seq.* February 20, 2004. The Board of Re-gents for Oklahoma State University and the Oklahoma Agricultural and Mechanical Colleges filed a Motion to Transfer, or in the alternative, Motion to Vacate, on the ground that Texas never acquired personal jurisdiction over the correct party. The Motion to Transfer was granted and the matter was heard in Payne County, the situs for venue of the Board of Re-gents. The parties were permitted to file supplemental briefs and the court heard oral argument. It then vacated the Texas judgment. We affirm.

Garrett claims that both the granting of the Motion to Transfer from Oklahoma County to Payne County was erroneous and that the trial court's decision to vacate the Texas court's judgment was erroneous. The matter comes to this court as a summary disposition, pursuant to Supreme Court Rule 1.36(a)(2), and we therefore review it de novo.

VENUE

We first address the Motion to Transfer. The plain language of the Uniform Enforcement of Foreign Judgments Act, 12 O.S.2001 § 721,[1] states that the foreign judgment

[1] 12 O.S.2001 § 721: A copy of any foreign judgment authenticated in accordance with the applicable Act of Congress or of the statutes of this state may be filed in the office of the court clerk of any county of this state. The clerk shall treat the foreign judgment in the same manner as a judgment of the district court of any county of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a district court of this state and may be enforced or satisfied in like manner.

may be filed in ". . . any county of this state." Garrett registered his judgment in Oklahoma County. The Board of Regents filed a Motion to Transfer to Payne County arguing that 12 O.S.2001 § 133 required venue of an action against the Board of Regents to be brought in the county of its official situs, which was Payne County.[2] Among other cases, the Board of Regents cited *Oklahoma Ordinance Works Authority v. District Court of Wagoner County*, 1980 OK 100, 613 P.2d 746, 749 for the proposition that venue in a case against a public official was in the county where the decision to perform or accomplish such acts emanated which was the county of official residence.

Garrett responded that he was not filing a petition and that venue was not relevant. He also pointed out to the court that the many unpublished district court opinions attached to the Motion by the Board of Regents had no legal value. The Uniform Enforcement of Foreign Judgment Act stated he could file his judgment in any county, and he had followed the procedures set forth. He objected to the Motion for Transfer.

The Motion to Vacate the Foreign Judgment was transferred to Payne County. We find that the result was correct.

Provided, however, that no such filed foreign judgment shall be a lien on real estate of the judgment debtor until a certified copy of the judgment so filed is also filed in the office of the county clerk in the county where the real estate is located. The amendment to § 721, effective November 1, 2004, requires the foreign judgment creditor to comply with 12 O.S.2001 § 706 (B) which describes the creation of a judgment lien on real estate.

[2] 12 O.S.2001 § 133 provides: Actions for the following causes must be brought in the county where the cause, or some part thereof arose:

* * *

Second. An action against a public officer for an act done by him in virtue, or under color, of his office, or for neglect of his official duties.

Registering a foreign judgment in some cases may bring a judgment debtor into court for litigation purposes. "A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a district court of this state and may be enforced or satisfied in like manner." 12 O.S.2001 § 721. Consequently, venue becomes an important legal right that is not embedded in the Act itself. In *Ex Parte Wells*, 567 So.2d 388 (Ala.Civ.App.1990), the Court of Civil Appeals of Alabama held that venue for filing a foreign default judgment under the Foreign Judgments Act was proper in the judgment debtor's county of residence, pursuant to the general venue statute. In that case, the judgment debtor argued that otherwise, allowing the judgment creditor to file the foreign judgment in any county granted it a "super status" for venue purposes and could cause a resident, who may not have been afforded procedural due process in the sister state, the possible expense and inconvenience of challenging the action hundreds of miles from home.

Similarly, in *Cherwood, Inc. v. Marlin Leasing Corporation*, 268 Ga.App. 64, 601 S.E.2d 356 (Ga.App.2004), a party obtained a default judgment against a corporation in a foreign jurisdiction and, pursuant to the Uniform Enforcement of Foreign Judgments Act, filed it "in the office of the clerk of any court of competent jurisdiction of this state." The Georgia court noted that the Uniform Act does not provide any specific venue and determined then that the Georgia general venue statutes applied. It rejected the judgment creditor's argument that the court was simply a repository for the foreign judgment on the ground that a challenge, for instance, to personal jurisdiction, could give rise to an adversary proceeding. It concluded that the Uniform Act had to comply with the general venue requirements of the Georgia Constitution. Further, "[t]o rule otherwise would allow forum shopping by the unscrupulous plaintiff, not to mention presenting defendants who wish to challenge a filing under the

Uniform Act with geographical in-conveniences not faced by similarly situated defend-ants." *Id.* at 357. It then noted that other state courts, when faced with the Uniform Act which did not contain a specific venue section, also used their general venue laws.

Two of the three causes of action alleged by Garrett against Panhandle State sounded in tort—negligence and tortious interference with business and contractual relationships. The Board of Regents, the governing body of Panhandle State, is a constitutional entity. Okla. Const. Art. 6, § 31a. Further, it is a constitutional state agency for the purposes of the Governmental Tort Claims Act. 51 O.S.2001 § 151 *et seq.* Section 163 of the Governmental Tort Claims Act states:

> A. Venue for actions against the state within the scope of the act shall be either the county in which the cause of action arose or Oklahoma County, except that a constitutional state agency, board or commission may, upon resolution filed with the Secretary of State, designate another situs for venue in lieu of Oklahoma County.

In the case at bar, the Board of Regents has passed a resolution, codified at OAC 30:1, naming Payne County as its situs for venue and naming its service agents. That document was in the record, as well as its published resolution.

We hold that the general venue statutes apply to Oklahoma's Uniform Enforcement of Judgments Act, unless, as is found in the case at hand, a particular venue statute is applicable. The Motion to Vacate was properly transferred to Payne County, the situs for venue of the Board of Regents.

IN PERSONAM JURISDICTION

The Board of Regents filed a Motion to Vacate the Texas judgment based foremost on the ground that the Texas court failed to obtain personal jurisdiction over the Board of Regents. The record reveals that Garrett served Panhandle State attempting service of process according to Texas law, by

serving its Secretary of State who then mailed a copy of the process to the non-resident (interim president), by certified mail, return receipt requested.[3] The Board of Regents for Oklahoma Agricultural and Mechanical Colleges is a "body corporate," 70 O.S.2001 § 3411 (a), which has appointed agents for service of process. There is no proper service agent for Panhandle State, which is not a legal entity. Consequently, the Board of Regents posit, Texas did not obtain personal jurisdiction over the correct party. Further, this is shown on the face of the judgment roll and without need of resorting to extrinsic evidence. The rule is that "[t]he regularity and validity of a foreign judgment, including issues concerning the foreign court's jurisdiction, should be tested by the law of the jurisdiction where the judgment was rendered." *Pettit v. American National Bank of Austin*, 1982 OK 85, ¶ 3, 649 P.2d 525, 527. However, "Oklahoma is not required to give full faith and credit to foreign judgments where such judgments are rendered without jurisdiction over the parties." *First Republicbank Mineral Wells v. General Forging Die, Inc.*, 1990 OK CIV APP 98, ¶ 5, 801 P.2d 134, 135. In the case at bar, the Board of Regents did not offer any extrinsic evidence of failure to obtain personal jurisdiction (it also alleged failure to obtain personal jurisdiction because of insufficient minimum contacts with the State of Texas), rather, it relied on the judgment roll.[4]

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[3] 17.045 of the Tex.Civ.Prac. & Rem.Code:

> (b) If the secretary of state is served with process under Section 17.044(a)(3), he shall immediately mail a copy of the process to the nonresident (if an individual), to the per-son in charge of the nonresident's business, or to a corporate officer (if the nonresident is a corporation). . . .
>
> (d) The process or notice must be sent by registered mail or by certified mail, return receipt requested.

[4] The Board of Regents also asserted several grounds pursuant to Oklahoma law why the judgment should be vacated such as the

Garrett maintained that the judgment roll supported proper service pursuant to Texas law and that the judgment was not vulnerable to collateral at-tack. Garrett argued that absent defect obvious on the face of the judgment itself, the only court in which a party could challenge personal jurisdiction, was the court in which it was rendered. He stated that the mechanism for this procedure was something like a special appearance and challenge to jurisdiction. Garrett cited *A.L.T. Corporation v. Small Business Administration*, 801 F.2d 1451, 1456, (5th Cir.1986) for Texas' "absolute verity" rule: "Regardless of whether these alleged defects of service of process would have sustained a direct attack on the judgment, Texas courts refuse to entertain collateral attacks based on service defects if the judgment recites that the defendant was fully served. [citations omitted] '[I]t is the settled rule of this state that where a judgment is collaterally attacked, plain jurisdiction recitals contained therein must be accorded absolute verity.'" citing *Pure Oil Co. v. Reece*, 124 Tex. 476, 78 S.W.2d 932, 934 (1935). The Texas judgment recites that the ". . . Defendant, although having been duly served and legally cited to appear and answer, failed to appear and answer so as to place the merits of the Plaintiff's claims in issue, and wholly made default." Nonetheless, Texas law is not construed as rigidly as Garrett argues.

In *American Steel Building Company, Inc. v. Davidson & Richardson Construction Company*, 847 F.2d 1519 (11th Cir.1988), Fred Davidson and Michael Richardson entered a contract to buy specially manufactured steel buildings from American Steel Building Company. The contract had a clause naming Texas as the legal forum state. American Steel alleged Davidson refused delivery and filed suit against both

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Governmental Tort Claim Act, 51 O.S.2001 § 151 *et seq.*; the Oklahoma statute of limitations and the fact that the judgment included punitive damages, which the Board claimed violated public policy; and lack of minimum contacts. We do not ad-dress these grounds.

men and their partnership in Harris County, Texas. Pursuant to the Texas long-arm statute, American Steel served the Texas Secretary of State who then mailed a copy of the complaint and summons by certified mail to "Zed" Davidson, in care of his company in Hinesville, Georgia. The Secretary of State received a receipt signed by someone named Thomas Burriss (whom counsel indicated was Davidson's son-in-law). Davidson did not appear or answer and default judgment was entered against him in Texas. American Steel then filed a suit to enforce its judgment in the U.S. District Court for the Southern District of Georgia. Fred Davidson filed an affidavit stating he had never been known as "Zed." American Steel moved for summary judgment which the district court granted finding that Texas had properly obtained jurisdiction over Davidson and that the Texas judgment was entitled to full faith and credit. On appeal, the *American Steel* court noted the rule enunciated by *A.L.T.*, that is, that Texas courts do not allow collateral attacks on default judgments based on jurisdictional defects, however, that rule does not apply when the second court's inquiry discloses that jurisdictional questions were not fully and fairly litigated; if they were not finally decided in the court that rendered the decision, then it is not entitled to full faith and credit. "In the present case, Davidson never appeared in the Texas court, never litigated the jurisdictional issues, and judgment was by default. This court has held that where the defendant does not appear, and judgment is by default, the state court judgment does not preclude the federal court from re-viewing the jurisdictional issues." *Id.* at 1521. The Board of Regents was not served, did not appear, answer, or litigate in any manner the question of jurisdiction. The Oklahoma Court properly questioned the legality of personal jurisdiction pursuant to Texas law.

In the case at hand, although there was a recitation on the judgment roll that service was proper, the collateral attack with respect to personal jurisdiction because the Board of

Regents was not served must be allowed, pursuant to Texas law. Panhandle State University cannot be a proper party defendant under Oklahoma law. The Board of Regents, or one of its named legal agents, had to have been served with process. There is no evidence in the judgment roll that the Board of Regents was properly served under either Texas or Oklahoma law. Texas did not obtain personal jurisdiction over the Board of Regents.

The Motion to Transfer on the ground of improper venue is AFFIRMED. The Order Granting the Motion to Vacate the Foreign Judgment is AFFIRMED.

ADAMS, J., and MITCHELL, P.J., concur.

APPENDIX C

IN THE DISTRICT COURT OF PAYNE COUNTY
STTE OF OKLAHOMA

[Filed: MAY 25, 2005]

Case No. C-2004-309

DONALD GARRETT,

Plaintiff,

vs.

OKLAHOMA PANHANDLE STATE UNIVERSITY,

Defendant.

ORDER

This matter came on for consideration on the 24th day of March, 2005, with reference to the Motion to Vacate and Set Aside Foreign Judgment filed on this matter by the Defendant. The Court previously heard oral argument from the parties on this matter on November 9, 2004. Following that hearing, the parties submitted supplemental briefs for the Court's consideration.

The Court, having fully considered all matters at issue, and for cause shown, SISTAINS and GRANTS Defendant's Motion to Vacate and Set Aside Foreign Judgment.

/s/ [Illegible]
Judge of the District Court

Date signed: 05-25-2005

APPENDIX D

IN THE DISTRICT OF DALLAS COUNTY, TEXAS
116th JUDICIAL DISTRICT

CAUSE NO. 02-11694-F

DONALD GARRETT,

Plaintiff,

v.

OKLAHOMA PANHANDLE STATE UNIVERSITY,

Defendant.

FINAL JUDGEMENT AGAINST OKLAHOMA PANHANDLE STATE UNIVERSITY

On the 11th day of March, 2003, the Court considered the Plaintiff's Motion for Default Judgment and the evidence presented therein for the above entitled and numbered cause wherein Donald Garrett is the Plaintiff and Oklahoma Panhandle State University ("OPSU" or "Defendant") is the Defendant. The Plaintiff has appeared by his attorney of record and announced ready for trial. The Defendant, although having been duly served and legally cited to appear and answer, failed to appear and answer so as to place the merits of the Plaintiff's claims in issue, and wholly made default.

Citation was served according to law and returned to the clerk where it remained on file for the time required by law. The Court has considered the evidence of damages presented to the Court by testimony and is of the opinion that the allegations of the Plaintiff's Petition have been admitted, that the causes of action are for negligence, breach of implied contract, and tortuous interference, and that Plaintiff's Motion for Default Judgment against Defendant Oklahoma Panhandle

State University is well taken and should be GRANTED in all things as set forth below.

IT IS THEREFORE ORDERED, ADJUSGED AND DECREED that Plaintiff Donald Garrett has final judgment against and recover of and from Defendant Oklahoma Panhandle State University for the following:

1. Action damages of $2,500,000;
2. Exemplary damages of $500,000;
3. Pre-judgment interest, until judgment, in the amount of $42,410.96;
4. Post-judgment interest, compounded annually, at the highest legal rate from judgment until paid; and
5. All Costs of suit.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that OPSU shall immediately produce to Plaintiff all records relating to Plaintiff's participation in any athletic program at OPSU, all statistics OPSU has provided to the NCAA relating to any of its athletic programs that competed during the time period January 1, 1998, through December 31, 1999, and all documents which substantiate plaintiff's performance (including statistical performance) at OPSU in men's athletics.

IT IS FURTHER ORDERED, ADJUSGED AND DECREED that Plaintiff is allowed such writs and processes as may be necessary in the enforcement and collection of this judgment.

SIGNED this the 11th day of March, 2003.

/s/ Carlos Lopez
Judge Presiding

ATTESTATION OF RECORD OF DISTRICT CLERK

STATE OF TEXAS
COUNTY OF DALLAS

THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS

I, JIM HAMLIN, Clerk of the District Courts of Dallas County, Texas, do hereby certify that the foregoing and annexed writing is a true and correct copy of Final Judgment in the case of Donald Garrett vs. Oklahoma Panhandle State University in said District Court as the same appears on file and of record in the records of said court, which said records are in my charge and custody as such clerk. IN WITNESS WHEREOF, I have at my office in the county and state aforesaid, set my hand and affixed hereto the official seal of said District Court on this 8th day of January, 2004.

/s/ Jim Hamlin
JIM HAMLIN
Clerk of the District Court
of Dallas County, Texas

STATE OF TEXAS
COUNTY OF DALLAS

I, Merrill Hartman, Judge of the 192nd Judicial District Court of Dallas County, Texas, and Presiding Judge of said Court, do hereby certify that Him Hamlin, whose genuine signature is affixed to the above and foregoing certificate, was at the date of signing said certificate and now is the Clerk of the said Judicial Court of Dallas County, Texas, aforesaid, and that his official acts as such Clerk are entitled to full faith and credit under the constitution of the United States and that the foregoing attestation is in good form and in accordance with law and that the seal affixed thereto is the seal of said District Court. Given under my hand and the official seal of said Court is 8th day of January, 2004.

/s/Merrill Hartman
MERRILL HARTMAN
Presiding Judge

STATE OF TEXAS
COUNTY OF DALLAS

I, JIM HAMLIN, Clerk if the District Courts of Dallas County, Texas, aforesaid, do hereby certify that said Court is a court of record, and that Merrill Hartman, whose name is affixed to the above certificate, is and was at the time of the making of said certificate the duly commissioned, qualified, sworn, and acting Presiding Judge of said Court and that I am well acquainted with the handwriting of said Judge and known that his signature to said certificate is genuine. IN TESTIMONY WHEREOF, I have here unto set my hand and affixed the seal of said Court this 8th day of January, 2004.

/s/ Jim Hamlin
JIM HAMLIN
DISTRICT CLERK

APPENDIX E

§ 721. Filing and status of foreign judgments

A copy of any foreign judgment authenticated in accordance with the applicable Act of Congress or of the statutes of this state may be filed in the office of the court clerk of any county of this state. The clerk shall treat the foreign judgment in the same manner as a judgment of the district court of any county of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a district court of this state and may be enforced or satisfied in like manner. Provided, however, that no such filed foreign judgment shall be a lien on real estate of the judgment debtor until the judgment creditor complies with the requirements of subsection B of Section 706 of this title.

APPENDIX F

§ 17.045. Notice to Nonresident

(a) If the secretary of state is served with duplicate copies of process for a nonresident, the documents shall contain a statement of the name and address of the nonresident's home or home office and the secretary of state shall immediately mail a copy of the process to the nonresident at the address provided.

(b) If the secretary of state is served with process under Section 17.044(a)(3), he shall immediately mail a copy of the process to the nonresident (if an individual), to the person in charge of the nonresident's business, or to a corporate officer (if the nonresident is a corporation).

(c) If the person in charge of a nonresident's business is served with process under Section 17.043, a copy of the process and notice of the service must be immediately mailed to the nonresident or the nonresident's principal place of business.

(d) The process or notice must be sent by registered mail or by certified mail, return receipt requested.

(e) If the secretary of state is served with duplicate copies of process as an agent for a person who is a nonresident administrator, executor, heir, guardian, or personal representative of a nonresident, the secretary shall require a statement of the person's name and address and shall immediately mail a copy of the process to the person.

CREDIT(S)

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 158, § 2, eff May 25, 1987; Acts 2001, 77th Leg., ch. 275, § 1, eff. Sept 1, 2001.

REVISOR'S NOTE

1997 Main Volume

Although portions of the source law require notice to be sent by registered mail, V.A.C.S. Article 29c authorizes the use of certified mail whenever the law specifies registered mail. The revised law restates that rule in order to avoid any confusion.

HISTORICAL AND STATUTORY NOTES

2007 Electronic Update

2001 Legislation

Acts 2001, 77th Leg., ch. 275, rewrote subsec. (a)

1997 Main Volume

The 1987 amendment added subsec. (e).

Prior Laws:

Acts 1959, 56th Leg., p. 85, ch. 43, §§ 2, 5, 6.

Vernon's Ann. Civ. St. art. 2031b, §§ 2, 5, 6.

APPENDIX G

§ 3411. Board of Regents for Oklahoma Agricultural and Mechanical Colleges—Body corporate—Official seal—Officers—Terms and duties of officers—Proceedings

(a) The Board of Regents for Oklahoma Agricultural and Mechanical Colleges shall be a body corporate and shall adopt an official seal, which shall be attached to all official documents issued by the Board and all contracts entered into by the Board.

(b) The Board of Regents shall annually elect from its membership a chairman, a vice-chairman, and a secretary, each of whom shall serve for a term of one (1) fiscal year, and who shall have such powers and duties as may be prescribed by the Board. The Board shall adopt such rules and regulations as it deems necessary to govern its proceedings and the conduct of its business. The secretary of the Board shall keep minutes of all meetings and all transactions considered at such meetings, and it shall not be necessary that the secretary be a member of the Board.

APPENDIX H

Rule 93. Certain Pleas to be Verified

A pleading setting up any of the following matters, unless the truth of such matters appear of record, shall be verified by affidavit.

1. That the plaintiff has not legal capacity to sue or that the defendant has not legal capacity to be sued.

2. That the plaintiff is not entitled to recover in the capacity in which he sues, or that the defendant is not liable in the capacity in which he is sued.

3. That there is another suit pending in this State between the same parties involving the same claim.

4. That there is a defect of parties, plaintiff or defendant.

5. A denial of partnership as alleged in any pleading as to any party to the suit.

6. That any party alleged in any pleading to be a corporation is not incorporated as alleged.

7. Denial of the execution by himself or by his authority of any instrument in writing, upon which any pleading is founded, in whole or in part and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed. Where such instrument in writing is charged to have been executed by a person then deceased, the affidavit shall be sufficient if it states that the affiant has reason to believe and does believe that such instrument was not executed by the decedent or by his authority. In the absence of such a sworn plea, the instrument shall be received in evidence as fully proved.

8. A denial of the genuineness of the indorsement or assignment of a written instrument upon which suit is brought by an indorsee or assignee and in the absence of such a sworn plea, the indorsement or assignment thereof shall be held as

fully proved. The denial required by this subdivision of the rule may be made upon information and belief.

9. That a written instrument upon which a pleading is founded is without consideration, or that the consideration of the same has failed in whole or in part.

10. A denial of an account which is the foundation of the plaintiff's action, and supported by affidavit.

11. That a contract sued upon is usurious. Unless such plea is filed, no evidence of usurious interest as a defense shall be received.

12. That notice and proof of loss or claim for damage has not been given as alleged. Unless such plea is filed such notice and proof shall be presumed and no evidence to the contrary shall be admitted. A denial of such notice or such proof shall be made specifically and with particularity.

13. In the trial of any case appealed to the court from the Industrial Accident Board [FN1] the following, if pleaded, shall be presumed to be true as pleaded and have been done and filed in legal time and manner, unless denied by verified pleadings:

(a) Notice of injury.

(b) Claim for compensation.

(c) Award of the Board.

(d) Notice of intention not to abide by the award of the Board.

(e) Filing of suit to set aside the award.

(f) That the insurance company alleged to have been the carrier of the workers' compensation insurance at the time of the alleged injury was in fact the carrier thereof.

(g) That there was good cause for not filing claim with the Industrial Accident Board[1] within the one year period provided by statute.

(h) Wage rate.

A denial of any of the matters set forth in subdivisions (a) or (g) of paragraph 13 may be made on information and belief.

Any such denial may be made in original or amended pleadings; but if in amended pleadings the same must be filed not less than seven days before the case proceeds to trial. In case of such denial the things so denied shall not be presumed to be true, and if essential to the case of the party alleging them, must be proved.

14. That a party plaintiff or defendant is not doing business under an assumed name or trade name as alleged.

15. In the trial of any case brought against an automobile insurance company by an insured under the provisions of an insurance policy in force providing protection against uninsured motorists, an allegation that the insured has complied with all the terms of the policy as a condition precedent to bringing the suit shall be presumed to be true unless denied by verified pleadings which may be upon information and belief.

16. Any other matter required by statute to be pleaded under oath.

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No. 06-1392

IN THE

Supreme Court of the United States

DONALD GARRETT,

Petitioner,

v.

OKLAHOMA PANHANDLE STATE UNIVERSITY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Oklahoma

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* PROFESSOR LUKE MEIER IN SUPPORT OF PETITIONER

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On Petition for Writ of Certiorari to the Supreme Court of Oklahoma

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Amicus Curiae respectfully requests this Court's leave to file an amicus curiae brief pursuant to Rule 37.2(b) of the Rules of Supreme Court.

Amicus Curiae is an Assistant Professor of Law, currently visiting at the University of Nebraska-Lincoln College of Law. *Amicus* supports Petitioner Donald Garrett's Petition for Writ of Certiorari. This case raises important issues under the Full Faith and Credit Clause and Supreme Court precedent which are worthy of this Court's consideration.

Consent to file an *amicus curiae* brief has been given by counsel for Petitioner Donald Garrett, but has been withheld by Respondent Oklahoma Panhandle State University.

Respectfully submitted,

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Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Oklahoma

BRIEF OF *AMICUS CURIAE* PROFESSOR LUKE MEIER IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

Amicus is currently a Visiting Assistant Professor of Law at the University of Nebraska College of Law. He has taught and researched in the areas of Constitutional Law, Federal Courts, and Procedure.[1]

[1] The attorneys representing Donald Garrett have consented to the filing of this brief. The attorneys representing Oklahoma Panhandle State University do not consent to this filing. Pursuant to Rule 37.6, *amicus* states that none of the parties nor their counsel wrote this brief in whole or in part. The costs to print, file, and serve this brief were borne by Hughes & Luce LLP, which is the law firm representing Donald Garrett in this litigation. *Amicus* received no monetary contribution to the preparation or

SUMMARY OF THE ARGUMENT

This case involves the effect a state court must give under the Full Faith and Credit Clause to the judgment of a sister state court. The case is complicated somewhat by the fact that the judgment of the sister state court in this case is against a political subdivision of the State in which enforcement is sought. In *Nevada v. Hall*, 440 U.S. 410 (1979), and *Franchise Tax Board v. Hyatt*, 538 U.S. 488 (2003), this Court addressed the effect of the Full Faith and Credit Clause in interstate litigation against a state entity. The clear import of *Hall* and *Hyatt* is that neither sovereign immunity nor the Full Faith and Credit Clause preclude a State from suit in a sister State's courts under the sister State's applicable laws. This case gives the Court an opportunity to tackle issues anticipated by the Court, but left unresolved, in those two cases. Specifically, the Court can use this case to clarify whether the Full Faith and Credit Clause applies differently when a collateral attack on a sister state judgment is being asserted by an agent of a sovereign State.

Apart from the difficulties raised because Defendant Oklahoma Panhandle State University ("OPSU") is a state entity, this case also implicates exceedingly intricate questions regarding what types of defenses are "jurisdictional" and thus the proper basis for a collateral attack under standard Full Faith and Credit Clause jurisprudence. Here, OPSU has asserted the defense of capacity to be sued. The caselaw is muddled on whether this defense is "jurisdictional" and thus a proper basis for collateral attack under the Full Faith and Credit Clause. Because the litigation strategy for defendants such as OPSU so often depends on whether their asserted

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submission of this brief apart from the costs associated with printing, filing, and serving this brief, which were paid by Hughes & Luce LLP directly to the printer. The views expressed in this brief are those of *amicus* and do not necessarily reflect the views of either Drake University Law School or the University of Nebraska College of Law.

defense is "jurisdictional," litigants such as OPSU would greatly benefit from a Court opinion discussing how to determine whether a defense is "jurisdictional" for purposes of the Full Faith and Credit Clause.

ARGUMENT

I. This Case Implicates the Unresolved Issue Raised by *Hall* and *Hyatt* Regarding Whether the Full Faith and Credit Clause Applies Differently When a State Entity Collaterally Attacks a Sister State Default Judgment

To place the current case into proper context, it is first useful to note the similarities between this litigation and that in *Hall* and *Hyatt*. In *Hall*, California residents brought a tort suit in California state court against the University of Nevada and the State of Nevada for injuries sustained as a result of the alleged careless driving of a Nevada state employee. *See Hall*, 440 U.S. at 411-14. In *Hyatt*, a Nevada resident brought suit in Nevada court against the Franchise Tax Board of California for alleged tortuous conduct by the Franchise Tax Board in attempting to collect a disputed tax assessment. *See Hyatt*, 538 U.S. at 490-91. In this case, a Texas resident brought suit in Texas Court against OPSU for alleged misconduct by the Oklahoma state school in maintaining required statistical information.

In all three suits, the defendant state entity has claimed a defense to liability under the entity State's law. In *Hall*, the Nevada defendants claimed that their liability in the California state court action was limited by Nevada's $25,000 limitation to Nevada's waiver of sovereign immunity. *See Hall*, 440 U.S. at 412-13. In *Hyatt*, the California defendant claimed that its liability was limited by California's complete sovereign immunity for California agencies. *See Hyatt*, 538 U.S. at 491. In the current case, the Oklahoma defendant,

OPSU, claims that its liability is limited by Oklahoma law regarding the capacity of OPSU to be sued.

Hall and *Hyatt* are noticeable different from the current litigation, however, in that the state defendants in those cases asserted their defenses in the sister state forum. In both *Hall* and *Hyatt*, the state defendants maintained that the sister State in which the litigation had been filed was required to respect their home-state immunity defense under the Full Faith and Credit Clause. In both cases, this Court rejected the argument. *See Hyatt*, 538 U.S. at 496; *Hall*, 440 U.S. at 424.

In the case before the Court, however, rather than assert its Oklahoma state law defense in the Texas state court proceedings, OPSU has instead waited until Garrett's attempted enforcement of the Texas default judgment in the Oklahoma courts. Then, in the confines of the Defendant's home State, OPSU collaterally asserted their Oklahoma capacity defense to collaterally attack the Texas judgment. Oklahoma state courts accepted the argument and refused to enforce the Texas judgment.

As will be discussed in more detail in the following Section of this brief, a litigant that is not a state entity is only allowed to collaterally attack a sister state court's judgment on "jurisdictional" grounds. Thus, were OPSU not an Oklahoma state entity, its attempt to collaterally attack the Texas default judgment issued in this litigation would depend on whether OPSU's lack of capacity defense is a jurisdictional argument. This is a difficult question in and of itself, as discussed below.

Because OPSU is a state actor, however, it is arguable that the Full Faith and Credit Clause might apply differently to Garrett's attempt to enforce the Texas judgment procured in this case. State courts might have additional sovereignty justifications to resist enforcement of a sister state's judgment against a state entity. This very issue was identified by then-

Justice Rehnquist in his dissenting opinion in *Hall*. Anticipating the inherent difficulties associated with interstate litigation involving state actors when the defendant State is precluded from asserting sovereign immunity defenses in the initial sister state court litigation, Justice Rehnquist mused:

> The problem of enforcement of a judgment against a State creates a host of additional difficulties. Assuming Nevada has no seizable assets in California, can the plaintiff obtain enforcement of California's judgment in Nevada courts? Can Nevada refuse to give the California judgment "full faith and credit" because it is against state policy? Can Nevada challenge the seizure of its assets by California in this Court?

Hall, 440 U.S. at 443 (Rehnquist, J., dissenting).

The questions raised by Justice Rehnquist's opinion, and left unanswered by the Court in both *Hall* and *Hyatt*, have come to fruition in the current litigation. The current litigation represents an opportunity to revisit the questions raised by *Hall* and *Hyatt* involving the application of the Full Faith and Credit Clause in litigation involving state actors. Despite Justice Rehnquist's anticipation of this issue almost thirty years ago in *Hall*, the Court has not since devoted attention to this question.

To illustrate the importance of this issue, consider the result in *Hall* had the Nevada defendants whom were sued in California state court used the same litigation strategy as OPSU in this case. In *Hall*, the Nevada defendants asserted their Nevada sovereign immunity claims in the California state courts. But, what if the Nevada defendants had taken the same litigation strategy as OPSU in this case? Instead of arguing in California courts that California was required to, or should as a matter of comity, apply Nevada's sovereign immunity law, the Nevada defendants could have ignored the suit and waited until the California plaintiffs attempted to enforce their California judgment in Nevada state courts.

Then, Nevada could have asserted their sovereign immunity arguments to a receptive audience: a Nevada state court.

As suggested by Justice Rehnquist in *Hall*, perhaps state courts have wider discretion under the Full Faith and Credit Clause to refuse to enforce a sister state judgment when the judgment is against a state actor. Under *Hall*, the California court was not required to give full faith and credit to Nevada's statutory defense. However, would Nevada courts have been required to give full faith and credit to that California judgment if enforcement had been attempted, and resisted, in Nevada state court? Or, if Nevada had simply ignored the initial litigation in the California courts, would its attempt to raise its defense in a Nevada enforcement action be governed by standard Full Faith and Credit Clause jurisprudence, or does the Full Faith and Credit Clause apply differently when an agent of a sovereign state is asserting the collateral attack on a sister court judgment? These issues threaten the essence of this Court's *Hall* and *Hyatt* decisions. By accepting Certiorari in this case, this Court can clarify whether the Full Faith and Credit Clause's usual mandate that a sister state's judgment be enforced is altered when the litigation involves a state actor claiming a defense that could have been raised in the forum State.

II. Lack of Capacity is Not a "Jurisdictional Issue" Which Permits a State Court to Ignore a Judgment of a Sister State Court

Apart from the complexities raised by the fact that this interstate litigation involves a state actor claiming defenses pursuant to its status as a governmental entity, this litigation also raises important questions regarding the standard Full Faith and Credit Clause analysis for determining when a sister state's judgment must be enforced. This case represents an opportunity for the Court to address the circumstances under which a sister state's judgment might be resisted without violating the Full Faith and Credit Clause.

OPSU's argument that they have no capacity to be sued is on the border line of the type of "jurisdictional" defect that this Court has acknowledged would permit a State to refuse to recognize a sister state court judgment without violating the Full Faith and Credit Clause. The default rule, of course, is that judgments of a sister state court must usually be enforced: "This Court has consistently recognized that, in order to fulfill this constitutional mandate, 'the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.'" *Underwriters Nat'l Assurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Ass'n.*, 455 U.S. 691, 704 (1982) (quoting *Hampton v. McConnel*, 3 Wheat. 234, 235 (1818) (Marshall, C.J.)). As a corollary to this rule, however, this Court has also explained that "a judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first State had power to pass on the merits-had jurisdiction, that is, to render the judgment." *Id.*

The Oklahoma state courts refused to enforce the Texas state judgment procured in this case. For this holding to have legitimacy under the analysis prescribed by this Court under the Full Faith and Credit Clause, it must be demonstrated that OPSU's lack of capacity to be sued is a jurisdictional defect allowing Oklahoma to ignore the Texas judgment without violating the Full Faith and Credit Clause. This legal proposition, however, is far from clear, as courts have split over whether lack of capacity implicates the jurisdiction of a court.

There are two general types of jurisdictional issues: subject matter jurisdiction and personal jurisdiction. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-84 (1999). Subject matter jurisdiction addresses the power of the court over the subject matter of the lawsuit. *See id.* Subject matter jurisdiction cannot be waived by the litigants. *See id.* There is conflicting authority regarding whether lack of capacity

implicates the subject matter jurisdiction of a court and can thus be asserted at any point in the litigation. *See, e.g., Bowers v. Du Page County Board of School Trustees,* 539 N.E.2d 246, 250 (Ill. App. 1989) ("Thus, the legal existence of the entity being sued may be brought into question at any time."); *Oliver v. Swiss Club Tell*, 222 Cal.App.2d 528, 537-38 (Cal. App. 1963) ("Where a suit is brought against an entity which is legally nonexistent, the proceeding is void *ab initio* and its invalidity can be called to the attention of the court at any stage of the proceeding. . . . Accordingly, it is a corollary to this rule that the objection that a plaintiff or defendant is nonexistent is not subject to waiver, as in the case of misnomer or lack of legal capacity, because the defect is jurisdictional."); 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1559 n.19 (2d. ed. 1990) (discussing and listing other cases in which lack of capacity was treated as a subject matter jurisdiction defect); 59 Am. Jur. 2d *Parties* § 362 (2007) (explaining that defense of lack of capacity to be sued is jurisdictional and cannot be waived).

The weight of authority, however, holds that lack of capacity is not a subject matter jurisdiction issue. *See, e.g., Summers v. Interstate Tractor & Equp. Co.*, 466 F.2d 42 (9th Cir. 1972) ("The question of a litigant's capacity or right to sue or to be sued generally does not affect the subject matter jurisdiction of the district court."); *Crane Const. Co. v. Klaus Masonry*, 71 F.Supp.2d 1138, 1141 (D.Kan. 1999) ("Consequently, under federal law, legal existence is not a jurisdictional issue . . . ."). Because lack of capacity can be waived in many jurisdictions, including Texas, *see Sixth RMA Partners v. Sibley*, 111 S.W.3d 46, 56 (Tex. 2003), and Oklahoma, *see Bailey v. Campbell*, 862 P.2d 461, 466 (1992),[2] it

[2] Thus, it seems, had Garrett filed suit in Oklahoma state court and executed service in the same manner as was done in this litigation, OPSU would be precluded from resisting a judgment against them had they not

follows that in these jurisdictions capacity is not the type of jurisdictional defect which implicates the power of the court over the subject matter of the lawsuit:

> It is difficult to reconcile the conception of capacity as a jurisdictional matter with [the federal procedural] requirement that capacity be put into issue by specific negative averment, which indicates the draftsmen's intention that the issue be excluded from the case unless expressly raised by a party at the pleading state. This is in sharp contrast to the strong and clearly expressed policy against the waiver of subject matter jurisdiction defects.

6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1559 (2d. ed. 1990)

It is also unclear whether a lack of capacity defense implicates the *personal* jurisdiction of a court and is thus a proper basis under the Full Faith and Credit Clause for a collateral attack on a state judgment. *See, e.g., Underwriters Nat'l Assur., Co.*, 455 U.S. at 711 ("Alternatively, respondents argue that the judgment of the Rehabilitation Court was not entitled to full faith and credit because that court lacked in personam jurisdiction over the North Carolina policyowners and the state officials. Although under different circumstances these questions might give us pause, it is clear that the Rehabilitation Court had personal jurisdictions over all parties . . . ."). Personal jurisdiction deals not with the power of the court over the subject matter of the lawsuit, but rather with the Due Process Clause limitations on the power of the court over the persons or property involved in the lawsuit.

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properly raised the capacity defense before the Oklahoma trial court. That Oklahoma courts have accepted the tardy capacity defense to this Texas state court judgment, when the defense would be rejected if the initial judgment was under Oklahoma law, highlights the egregiousness of the Full Faith and Credit violation by the Oklahoma state courts in this litigation.

See Ruhrgas AG, 526 U.S. at 583-84. Analysis of whether a court has personal jurisdiction over a person is analyzed under the now-familiar notions of "minimum contacts" and "traditional notions of fair play and substantial justice." See 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1067 (2d. ed. 1990). Personal jurisdiction, like capacity to be sued, can be waived. Therefore, that many jurisdictions treat capacity as a defense that can be waived does not necessarily mean that the issue is not a "jurisdictional" issue, relating to the "power" of the state court, which permits a state court to ignore a sister court's judgment without violating the Full Faith and Credit Clause. Again, here, the authorities are scarce and less than clear. *See, e.g.*, 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1559 (2d. ed. 1990) (stating that a lack of capacity defense is "somewhat analogous to lack of personal jurisdiction").

Ambiguity in this area is particularly problematic for litigants such as OPSU who must decide whether to appear in the foreign litigation to assert their presumed jurisdictional challenge. Had OPSU asserted its lack of capacity defense in the Texas court litigation, it would have been foreclosed under principles of res judicata from reasserting them in the subsequent litigation in Oklahoma courts to enforce the Texas judgment (assuming Garrett had won on the merits). *See Durfee v. Duke*, 375 U.S. 106, 111 (1963) ("[A] judgment is entitled to full faith and credit--even as to questions of jurisdiction--when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."). On the other hand, if a litigant in OPSU's position ignores the out of state litigation, takes a default judgment, and collaterally attacks the jurisdiction of the initial court, it foregoes the ability to litigate the underlying merits of the litigation should it lose on the alleged jurisdictional defense. *See Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522, 525 (1931)

("If, in the absence of an appearance, the court had proceeded to judgment, and the present suit had been brought thereon, respondent could have raised and tried out the [personal jurisdiction] issue in the present action."); 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4430 (2d. ed. 2002) ("[U]nsuccessful submission of the question by motion to vacate a default judgment should have the same preclusion effects as submission before judgment."). This is a difficult choice for the defendant even when it is clear that the defendant has a defense which is jurisdictional in nature and thus a legitimate basis for a collateral attack on a default judgment. *See* 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4430 (2d. ed. 2002) ("[A] substantial burden can be imposed on a defendant merely by initiating suit in a court that has at least a tenuous basis for asserting [personal] jurisdiction. Litigation of the question in a distant forum may prove onerous. There is a substantial risk, further, that the initial court cannot be trusted to measure its own power with the same disinterested detachment as a later court. Submission of the matter for a binding determination may prove an unattractive prospect. The alternative prospect of default, however, forfeits the opportunity to defend on the merits should the assertion of jurisdiction be upheld."). When, however, a defendant's claim is one, such as a lack of capacity defense, which is only arguably a jurisdictional claim, the litigation choice for the defendant becomes even more difficult. If a defendant such as OPSU takes a default judgment but is wrong about the jurisdictional nature of their defense, they will be precluded in the subsequent enforcement litigation not only from arguing the merits of the lawsuit but also from asserting the defense which they incorrectly presumed to be jurisdictional.

It is not clear that OPSU understood the tenuous position they were in when they neglected to challenge capacity in the Texas litigation. A diligent litigant, however, would benefit from a Supreme Court decision discussing what types of

issues constitute "jurisdictional" claims that can be the basis of a collateral attack on a judgment consistent with the Full Faith and Credit Clause. This issue will most obviously arise under facts similar to *Hall* and *Hyatt*, in which the collateral attack is based on a state entity's sovereign immunity claim. *Cf. Idaho v. Coeur d'Alene,* 521 U.S. 261, 267 (1997) (stating that the Eleventh Amendment "enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction"). Clarification on this issue would at least allow defendants to make informed decisions as to when they can forego litigation in a foreign jurisdiction without waiving their defense.

CONCLUSION

Respectfully, for the reasons stated above and for those articulated in Petitioner's brief, the Writ of Certiorari should be granted.

Respectfully submitted,

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